"Alternatively the Defendants say that if they were ever liable on the said contracts or any of them (which is denied) the facts set out in paragraph 8 hereof constituted a novation whereby the Plaintiffs accepted the said A. Pinto as a contracting party in place of the Defendants.")

This part of the defence pleaded arose out of a letter which purported to have been sent by the respondents to the appellants. For the purposes of this issue this letter must be taken as genuine and written with the authority of the respondents. The letter is in the following terms:—

"3rd October, 1952.

"Messrs. G. Ramchand,
Singapore.

Dear Sirs,

Further to our letter of 1st October, we wish to inform you that Mr. Pinto has since come to an agreement with us. He undertakes to pay off the entire debt due by monthly instalments. He has since paid us an initial amount and undertakes to pay up all the balance himself, as arranged. In consideration of his undertakings to pay, we now relieve you of all liabilities and will not look to you for payment.

Yours faithfully,
LAM SOON CANNERY LIMITED
sgd. (in Chinese)
Managing Director."

In these circumstances we have to consider the legal consequences of an agreement between Pinto and the respondents by which Pinto undertook to satisfy the claim of the respondents and the respondents in their turn undertook to discharge the appellants from further liability. In the issue agreed between the parties it is a question in the form whether this agreement can constitute a "novation" which extinguishes the liability of the appellants. I am not happy about the terms of the issue. I think that its scope is still too restricted to be of much use. The word "novation" is a technical term of the Civil Law. It is not a technical term of English law, and it does not appear that English authorities are entirely agreed on the meaning. If it is used in its more usual meaning there must be a tripartite agreement between the original parties and the substituted party. This is not the case here. It is only alleged that there was a contract between the respondents and Pinto. It is not alleged that the appellants were parties. I do not think that this can be called a novation. One might be content to decide the question on this narrow ground. Possibly the word 'novation' might be extended to cover the facts in the present case and leave us with the serious question when B owes a debt to A, can an agreement between A and C have the effect of extinguishing the debt owing by B to A?

At the outset we are faced with the fundamental consideration that a stranger cannot acquire rights under a contract. The judgment of Lord Haldane in *Dunlop v. Selfridge*[1] at p. 853 says:—

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in person."

So strictly has this been enforced in the Common Law that it appears that in the Common Law payment by a stranger was no answer on the part of a debtor (see *Jones v. Broadhurst*[2]), (*Comyn's* Digest Accord (A 2) 5). The effects of a doctrine so unreasonable seem to have been modified on equitable grounds (see *Cook v. Lister*[3], *Thornton & Maynard*[4]). But the basis of these decisions seems to be that it is inequitable for a person having been paid by a stranger, to recover over again the debt. This has been extended to the case where a creditor has agreed with a stranger to receive and has received a smaller sum in satisfaction of a debt (*Hirchand v. Temple*[5]). The members of the Court of Appeal gave various reasons for their decision but it seems that the explanation given above is the only one in accordance with principle.

It is not alleged in the present case that the contract with Pinto has been performed. I think that equitable principles in the circumstances do not require of the respondents more than that they should give credit for what they have actually received from Pinto. This they have done. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sisson & Delay; Drew & Napier.*

PELEPAH VALLEY (JOHORE) RUBBER ESTATES, LTD. v. SUNGEI BESI MINES, LTD.

[K.B. Div. (Tucker J.) March 31, 1944]

Lease — Sub-lease of tin mines in Johore — Occupation of Johore by Japanese — Claim for instalment of purchase money — Whether sub-lease frustrated by Japanese occupation — Whether doctrine of frustration applicable to mining leases.

The plaintiffs claimed the balance of the annual instalment due for 1942 under an agreement relating to a tin mining sub-lease of land, situate in Johore and granted by the plaintiffs in 1932. The defendants contended that by reason of the Japanese occupation of Johore in January 1942, the lease was frustrated and therefore nothing was therefore due from them.

Held: (1) the contractual relationship between the parties was not frustrated, since it could not be said that at the date of the sub-lease the parties would inevitably have agreed that the Japanese occupation would cancel rather than suspend the sub-lease; (2) assuming that the law of Johore was the same as English law on the question of frustration of contract, the doctrine of frustration did not apply to mining leases which, in this respect, did not differ from ordinary leases; (3) the

defence that any title in the head lease or the sub-lease was destroyed by act of State was not applicable in the circumstances of this case.

Cases referred to:—

(1) *Gowan v. Christie* (1873) L.R. 2 Sc. & Div. App. 273.

(2) *Matthey v. Curling* 127 L.T. Rep. 247; (1922) A.C. 180.

(3) *Swift v. MacBean* 166 L.T. Rep. 87; (1942) 1 K.B. 375.

(4) *Leightons Investment Trust Ltd. v. Cricklewood Property & Investment Trust Ltd.* 169 L.T. Rep. 116; (1943) 1 K.B. 493.

(5) *Secretary of State for India v. Sardar Rustam Khan* (1941) A.C. 356.

(6) *Secretary of State for India v. Kamachee Boye Sahaba* 7 Moo. I. App. 476.

ACTION claiming the balance of an annual instalment of the purchase price of a mining sub-lease.

G. O. Slade, K.C. and *A. Gordon* for the plaintiffs.

D. A. Scott Cairns and *I. J. Lindner* for the defendants.

Cur. Adv. Vult.

The facts of the case are fully stated in the judgment.

Tucker J. : — In the year 1929 the plaintiffs were working certain rubber estates in Johore, which is an independent state under the protection of Great Britain. They held agricultural leases direct from the Sultan. By an agreement of 11th December, 1929, they granted to the defendants the right to bore and prospect for tin in and over certain portions of their estates together with an option to select an area of from 400 to 600 acres in respect of which the plaintiffs undertook, if required so to do, to apply to the Government for a mining lease and grant to the defendants a registered mining sub-lease for the term of the mining lease and any renewal thereof. Such a sub-lease is very frequently granted in Johore and by the law of that state retains all the qualities of a sub-lease and is not treated as an assignment. The consideration was £625 paid on the execution of the agreement, which sum was to be considered as part of the purchase price in the event of the option being exercised. The purchase price payable on exercise of the option was £150 per acre for land planted with rubber trees, payable as to £50 per acre in cash and the balance of £100 per acre within thirty days of the trees being cut down or injured, and £50 per acre for vacant land payable as to £17 in cash and the balance of £33 in respect of blocks of not less than 10 acres when required for mining operations. Payment of the whole was to be completed within twenty years of the grant of the sub-lease.

The defendants agreed to pay the rents due under the head lease and were to be entitled to assign their rights under the agreement and sub-lease to a company to be formed by them. The form of the sub-lease to be granted is set out in a schedule to the agreement. By an agreement of 29th April, 1930, an option in respect of a further 200 acres was granted by the plaintiffs to the defendants at a price of £160 per acre. This agreement further provided that the balance of the purchase price payable under the principal agreement, after payment of the sums payable on the grant of the sub-lease, should be paid at the rate of £5,000 in each year, whether or not land to an equivalent value had been taken up.

On 25th July, 1930, the defendants exercised their option over 785 acres. On 9th March, 1931, the defendants caused to be registered Pelepah Tin Dredging, Limited (heereinafter referred to as "the company"), to take over their rights under these agreements. By an agreement of 12th March, 1931, the defendants' rights under the agreements were assigned to the tin company. In May 1932, the plaintiff's obtained mining leases from the Sultan in respect of the 785 selected acres for a period of 21 years. By an indenture of sub-lease dated 18 August, 1932, the plaintiffs sub-leased the 785 acres to the tin company for the period of the head leases or for any renewal thereof, for which renewal the sub-lessors undertook to apply, if so desired by the sub-lessees. Clause 8 of the sub-lease provides for payment of the agreed price by instalments in accordance with the terms of the original agreements as set out above, with certain additional provisions as to the payments to be made in the event of cancellation of the sub-lease in certain cirucmstances.

The sub-lease was executed in Johore, and on 14th September, 1932, the plaintiffs, the defendants and the tin company being in England and not knowing whether the sub-lease had by that date actually been executed, entered into a further agreement whereby they modified clause 5 of the agreement of 29th April, 1930 which had provided for the payment of a minimum sum of £5,000 each year. The modification only applied for a period ending 31st August, 1934, or until such time as the mining operations should be carried on at a reasonable profit, whichever should be the earlier, and was to the effect that during this period instead of paying the minimum sums of £5,000 a year the defendants or the tin company would pay for all lands taken up plus interest at 6½ per cent. upon any balance that would have been due under the agreement of 29th April, 1930.

At the end of 1935, a reconstruction of the plaintiff company was decided upon with the result that the company went into voluntary liquidation. A new company was formed called the Pelepah Rubber Company (hereinafter referred to as "the rubber Company") and by an agreement of 20th December, 1935, the plaintiff company and its liquidator assigned to the rubber company and its assets and the benefit of its contracts with the exception of any sums payable to the plaintiffs under the agreements of 11th December, 1929 and 29th April, 1930, made between the plaintiffs and the defendants. The mines were operated by the tin company under the provisions of the sub-lease and the payments of £5,000 a year duly made to the plaintiffs down to March, 1941, in which month the defendants and the tin company decided to amalgamate and the tin company went into voluntary liquidation. By an agreement of 31st March, 1941, the tin company assigned its assets and the benefit of all contracts to the defendants. Pursuant to this agreement the sub-lease was formally assigned to the defendants on 2nd July, 1941.

By an agreement of 10th October, 1941, which is the agreement sued upon in this action, made between the plaintiffs, the rubber company, the tin company, the defendants and another party not material to these proceedings, it was recited that the sum remaining due to the plaintiffs by the tin company had been agreed at £27,829 8s. 8d. and by clause 2 of the agreement the plaintiffs by their liquidator agreed not to prove in the liquidation of the tin company in respect of the sum and the defendants agreed with the plaintiffs that they would pay the said sum to the plaintiffs in accordance with and subject to the same terms and conditions as it was then payable by the tin company. It is for the balance of an annual instalment of £5,000 payable within three months of 15th August, 1942, being an instalment of the agreed sum of £27,829 8s. 8d. that this action is brought.

On or about 28th January, 1942, the Japanese armed forces occupied the whole of the State of Johore, and it is claimed in the defence to this action that on that date the sub-lease under the conditions of which the £27,000 odd was to be paid was brought to an end by the doctrine of frustration. It is important to observe that frustration is claimed as from that date, and not from some later date, as a result of the continued occupation by the enemy. The only facts proved before me with any degree of certainty as to the position in Johore since 1942 are that the Japanese have continued in effective occupation of the whole state, that the defendants' European staff some six in number, have been interned, and that the defendants have, of course, received no benefit from and had no access to the mines. It is not known whether or not the Japanese are working the mines, and it is, of course, impossible to estimate the duration of the enemy occupation or to know what will be the condition of the mines at the termination of their occupation.

Putting aside the question whether or not the doctrine of frustration applies to a mining lease such as this, the first question to be determined is whether the occupation of Johore on 28th January, 1942, was an event that frustrated the contractual relation then subsisting between the parties to the sub-lease. To answer this question it is, I think, necessary to decide whether or not, when the contract was entered into, both parties would of necessity have ageeed that in the events that had happened by 28th January, 1942, the contract should be not merely suspended or modified but completely destroyed and both parties automatically discharged. In January 1942, the sub-lease had eleven years still to run and the sub-lessees had the right to call upon the sub-lessors to apply for a renewal of the head lease and to grant them a sub-lease for the period of the renewal so that there was at least a reasonable prospect of enjoyment of the property for a further 32 years, subject to the restoration of normal conditions. Furthermore, by 1942 the sub-lessees would have paid a considerable portion of the total purchase price or premium.

Viewing the position as at 1930 or 1932, would both parties inevitably have agreed that if in January, 1942 the events which have actually taken place, should supervene, the contract should forthwith be put an end to for all purposes? I find it impossible to say of a contract of this nature that both parties would have so agreed. It appears to me quite possible that in such circumstances the defendants might have elected to take their chance of the Japanese being evicted within a reasonable period so that they might have an opportunity of reaping the benefit of the money they had expended during the remainder of the 32 years. If the question had arisen there might, of course have been a suggestion of a suspensory clause. All this is mere speculation, but I cannot say that both parties would, as a matter of course, have agreed that the contract should be frustrated. A mining lease of this kind with several years to run and a reasonable prospect of renewal bears little resemblance to the usual commercial contract for the delivery of commodities or machinery to which the doctrine of frustration has so

often been applied. Judging the matter from the angle of an implied term in the contract, which is, I think, now generally accepted as the proper test, I find it impossible, in the circumstances of the present case, to imply the term necessary for the defendants' case.

Assuming however, that the occupation by the Japanese on 28th January, 1942, would otherwise be sufficient to cause frustration the defendants are faced with the further difficulty, that they are seeking to apply the doctrine of frustration to a lease. As to this they say that a mining lease is altogether different from an ordinary lease of land or from a building lease. They rely on the language used by Lord Cairns in *Gowan v. Christie*[1], where, in comparing a mining lease with an agricultural lease, he says, at p. 284:—

"Although we speak of a mineral lease or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit: that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land."

The defendants contend that in reality such a lease is no more than a contract for the sale of minerals coupled with a right to the purchaser to go on and under the land to obtain what he has bought.

The defendants further say that in any event by the law of Johore this mining sub-lease is of a different nature from the English conception of a lease. "Estates" in land "demises" and "chattels real" are unknown to the law of Johore, which is based upon the notion of the tenant having usufructuary rights. The law on this subject was proved by Sir Fiennes Barrett-Lennard, a former Justice of the Supreme Courts of the Federated Malay States of Johore. From his evidence it appears that, although the law is based upon different conceptions of land tenure, none the less the forms and language used in leases closely resemble those of English leases and that for all practical purposes the results are the same, subject to certain statutory modifications and differences in remedy for breach of covenant, etc. On this evidence it seems to me no such fundamental difference in the nature of a lease of land or mining lease in Johore from similar instruments in this country is established which would justify me in holding that the English law with regard to frustration with reference to leases as laid down in such cases as *Matthey v. Curling*[2] and recently in *Swift v. MacBean*[3] and *Leightons Investment Trust, Ltd. v. Cricklewood Property & Investment Trust, Ltd.*[4] is inapplicable to the sub-lease in the present case, notwithstanding the emphasis that has been laid on our notions with regard to "seisin" and "chattels real" in these decisions. And, although mining leases have many features which distinguish them from ordinary leases of land, I do not think Lord Cairns' dictum referred to above is sufficient authority for holding that, apart from the difference in the law of Johore, this sub-lease should be distinguished from the leases in the authorities cited so as to make it subject to furstration by English law. If this is the true position, I think on the existing authorities it is for an appellate court so to hold.

In this connection I must observe that I have to apply the law of Johore with regard to frustration. Yet Sir Fiennes Barrett-Lennard was allowed to leave the witness box without a question being asked of him as to the law of Johore with regard to frustration in general and its particular application to this mining sub-lease, but I am asked to assume in the absence of evidence to the contrary that the law of Johore is the same as English law. I have made this assumption and give my decision on that basis, but I think it is unsatisfactory that an expert in foreign law should be called and not questioned as to a matter vital to the issues in the action.

A further defence was raised, namely, that any title in the head lease or sub-lease had been destroyed by "an act of State" which the Courts of this country would be bound to recognise, such act of State being the effective conquest of Johore by the Japanese. This submission was based upon such cases as the *Secretary of State for India v. Sardar Rustam Khan*[5] and the *Secretary of State for India v. Kamachee Boye Sahaba*[6]. It is sufficient to say that the principles of these cases are wholly inapplicable to the capture of British or Allied territory by the enemies of this country during a war which is still in progress and while British and Allied forces are actively engaged in endeavouring to evict the enemy from the territory in question.

For those reasons, I am of opinion that the plaintiffs are entitled to recover the sum claimed in this action and that the counterclaim which relates to the recovery of a part of the instalment of £5,000 for the year 1942 which was paid without prejudice must be dismissed. There must be judgment accordingly for the plaintiffs on the claim and counterclaim with costs.

Judgment for the plaintiffs.

Solicitors: *Stanley Johnson & Allen; Slaughter & May.*